STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2014
V	No. 312792 Oakland Circuit Court
AMONTE DENZEL REID, Defendant-Appellant.	LC No. 2012-240519-FC

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of armed robbery, MCL 750.529, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f.[1] The court sentenced defendant as a third habitual offender, MCL 769.11, to serve 25 to 80 years in prison for armed robbery, two years in prison for the two counts of felony-firearm, and four to ten years in prison for felon in possession of a firearm. We affirm.

Defendant contends that he was denied the effective assistance of counsel based on defense counsel's failure to (1) raise the defense of temporary innocent possession of a firearm, and (2) request a jury instruction on unarmed robbery. We disagree. In reviewing a claim of ineffective assistance of counsel, this Court is to determine (1) whether counsel's performance was objectively unreasonable and (2) but for the deficient performance, it is reasonably probable that the outcome would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Trial counsel's decision regarding which jury instructions

[1] The jury acquitted defendant of the charged offenses of assault with intent to murder, MCL 750.83, and one count of felony-firearm.

to request is generally considered part of trial strategy, which this Court does not second-guess. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Trial counsel has "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Under MCL 750.224f(1), a "person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state" unless certain conditions are met. In *People v Dupree*, 284 Mich App 89; 771 NW2d 470 (2009) (Opinion by M. J. KELLY, J.), aff'd in part and remanded, 486 Mich 693; 788 NW2d 399 (2010), this Court addressed the question whether traditional common-law defenses might apply to the crime of felon in possession of a firearm. *Id.* at 101-102. This Court concluded that "the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession." *Id*. at 104. "[A] defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm." *Id.* at 106. Further, to be justified in temporarily possessing a firearm, the defendant must not have "recklessly or negligently place[d] himself or herself in a situation where he or she would be forced to engage in criminal conduct." *Id.* at 108.

Our Supreme Court affirmed this Court's result, holding that the defendant must introduce "sufficient evidence from which the jury could [conclude] that he violated the felon-in-possession statute but that his violation could be justified because he honestly and reasonably believed that his life was in imminent danger and that it was necessary for him to exercise force to protect himself." *Dupree*, 486 Mich at 697.

In this case, defendant told Detective MacDonald that he went to the victim's house to sell drugs to the victim. The victim's testimony was that defendant came to his house to sell Vicodin. After entering the home, defendant said he had left the pills in his car. When he returned, according to the victim, defendant pointed a gun at him and said to give him all of the money in his wallet. Thus, the evidence established that defendant placed himself in a position to engage in criminal conduct and was not justified in temporarily possessing the firearm. Accordingly, defense counsel cannot be deemed ineffective for failing to raise the defense of temporary innocent possession of a firearm to the charge of felon in possession of a firearm. *Armstrong*, 490 Mich at 289-290.

Defendant also argues that defense counsel was ineffective for failing to request a jury instruction for unarmed robbery. Again, we disagree. "Unarmed robbery is clearly a necessarily included lesser offense of armed robbery." *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). The "instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and it is supported by a rational view of the evidence." *Id.* at 446.

The elements of armed robbery, MCL 750.529, are: (1) the defendant was engaged in the course of committing a larceny of any money or other property, (2) the defendant used force or violence against a person who was present or assaulted or put the person in fear, and (3) the defendant, in the course of committing the larceny, possessed a real or feigned dangerous weapon or represented that he or she possessed a dangerous weapon. *People v Chambers*, 277

Mich App 1, 7; 742 NW2d 610 (2007). The elements of unarmed robbery, MCL 750.530, are: (1) the felonious taking of the property of another, (2) by force or violence or assault or putting in fear, when (3) the defendant is unarmed. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). The element distinguishing unarmed robbery from the offense of armed robbery is the use of a weapon or an article used as a weapon. *Reese*, 466 Mich at 501.

Defendant told Detective MacDonald that "he was able to get both hands on the gun and spin it and the gun went off." Then, according to defendant's version, defendant dropped the gun and the victim's brother came into the room, picked up the gun, and fired a round at defendant as he was leaving the house. We hold that a rational view of the evidence did not support an unarmed robbery jury instruction. The jury would have to find that the victim pulled a gun on defendant in order to commit armed robbery of the pills, but that defendant was able to grab the gun with both hands and turn it around facing the victim, whereupon the gun went off and fell to the floor. Then, the jury would have to find that, after the victim was shot, defendant used force or violence or assault or put the victim in fear, without the use of a weapon, in order to steal the victim's wallet and cell phone. However, the victim was already shot and on the floor unable to move when defendant picked up the wallet and cell phone from the floor, and defendant could have simply reached down and picked the items up before leaving the residence. We hold that, because a rational view of the evidence could not support an unarmed robbery jury instruction, defense counsel was not ineffective for failing to request the jury instruction. Furthermore, the failure to request the instruction may have been deliberate trial strategy to force the jury into an "all or nothing" verdict. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Defendant has failed to demonstrate that defense counsel's performance was objectively unreasonable or that he was prejudiced by defense counsel's defective performance. *Armstrong*, 490 Mich at 289-290.

Next, in a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant contends that the evidence was not sufficient to support a conviction of armed robbery. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006); *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewed in a light most favorable to the people, a reasonable juror could find that defendant was guilty of armed robbery beyond a reasonable doubt. Defendant argues that nowhere in his testimony did the victim ever state that he was fearful or afraid of defendant at any time. Thus, the evidence was not sufficient to support the armed robbery verdict. This argument is without merit. At trial the prosecutor asked the victim what he was thinking when he saw the gun. The victim responded: "I was thinking, wow, I'm about to die, you know, like I'm just defending myself. I didn't really think nothing. I'm try to, just do what any other person would do, defend yourself." The trial court instructed the jury, in pertinent part, that to prove armed robbery the prosecutor must show that "the defendant used force or violence against, and/or put in fear [the victim]."

Here, the use of "and/or" in the jury instruction is the source of defendant's challenge. If the language of a statute is unambiguous, it is presumed that the Legislature intended the meaning plainly expressed, and judicial construction of the statute is not permitted. *People v Cole*, 491 Mich 324, 325, 330; 817 NW2d 497 (2012). When interpreting the common ordinary meaning of a word or phrase, use of a dictionary is appropriate. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012).

The word "and" is defined in pertinent part in *The American Heritage Dictionary of the English Language, Third Edition* (1992), as: "Together with or along with; in addition to; as well as." The word "or" is defined in pertinent part as: "Used to indicate an alternative, usually only before the last term of a series." Considering these definitions, the statutory phrase "the defendant used force or violence against, assaulted, *and/or* put in fear (emphasis added)," would be better understood as, "the defendant used force or violence against, or assaulted, or put in fear, or all of the above." We conclude that "and/or," while it may not be the preferred way to state alternatives, is not ambiguous, and its meaning is understood by the general public and the Legislature intended "the meaning plainly expressed."

The phrase "put in fear" is one alternative in a list. Therefore, it is not necessary that the prosecutor prove that defendant put the victim in fear as long as the prosecutor presented sufficient evidence that defendant used force or violence against the victim, or assaulted the victim. Nevertheless, the evidence, viewed in a light most favorable to the prosecutor, was sufficient to show that defendant used violence against the victim and assaulted the victim and placed the victim in fear. "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). The fact that defendant pointed a gun at the victim and demanded his money was "minimal circumstantial evidence" that the victim was placed in fear. *Id.* Viewed in a light most favorable to the people, we hold that a reasonable juror would find defendant guilty of armed robbery beyond a reasonable doubt.

Defendant additionally contends that because the jury acquitted him of assault with intent to commit murder and the lesser included offense of assault with intent to do great bodily harm, it could not find sufficient evidence to satisfy the first element of armed robbery, which requires an assault. We disagree. Assault with intent to commit murder and assault with intent to commit great bodily harm less than murder are specific intent crimes and require the prosecutor to show that the defendant had the specific intent to murder or to inflict serious injury of an aggravated nature. *People v Marshall*, 493 Mich 1020; 829 NW2d 876 (2013); *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Armed robbery is a specific intent crime and requires the prosecutor to show that the defendant had the specific intent to permanently deprive the victim of property. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000); *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). The verdict rendered by the jury reflects that it

believed defendant had the specific intent to rob the victim but not to commit great bodily harm or murder. Thus, acquitting defendant of the assault offenses did not negate the jury conviction of armed robbery.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood